FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6686

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

A-955

LARRY LEON CHANEY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

JUN 2 PAGE 10

RESPONSE OF THE STATE OF OKLAHOMA
TO THE PETITIONER'S APPLICATION FOR
A STAY OF EXECUTION OF DEATH WARRANT

TO: Honorable Byron R. White, Justice of the United States and Circuit Justice for the Tenth Circuit Court of Appeals.

The State of Oklahoma, by Michael C. Turpen, Attorney General of the State of Oklahoma, files its Response to the Petitioner Larry Leon Chaney's Application for a Stay of Execution of Death Warrant as follows:

1. The State on this day submits its Brief in Opposition to the Petitioner's Petition for a Writ of Certiorari with this Response and relies on the arguments therein to support its position that the execution date of the Petitioner, which is set for June 24, 1983, should not be delayed further. As is pointed out in its Brief in Opposition, this Court has denied certiorari on two previous occasions in this case and the intervening decision of this Court in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982), should not affect the death sentence heretofore imposed.

2. The Petitioner claims that the nondisclosure of certain investigative reports violated his constitutional rights. As is noted in the Brief in Opposition, this allegation was raised in the Petitioner's second Petition for Writ of Certiorari and review of this claim was declined. Furthermore, attached to this Response is a copy of transcripts of two hearings which were conducted by the state district court to determine the validity of the allegation (Appendix A and Appendix B). On page 38 of the May 1, 1981, hearing (Appendix A), it is revealed that the Petitioner's attorney,

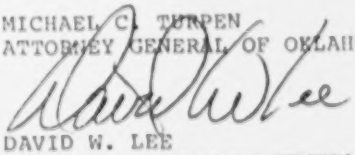
Mr. Smallwood, personally spoke to the witnesses reflected in the nondisclosed reports and then declined to call them as witnesses at the evidentiary hearing. This fact is discussed on pages 10-11 of the Brief in Opposition.

3. The chronology of legal steps undertaken by the Petitioner is set forth in the Order Affirming Denial of Post-Conviction Relief issued by the Oklahoma Court of Criminal Appeals on February 3, 1983 (Appendix A of the Petitioner's Petition for Writ of Certiorari). The Petitioner's conviction has been upheld three times by the Oklahoma Court of Criminal Appeals. His jury trial was held in September of 1977, almost six years ago.

For the reasons stated in this Response and in the State of Oklahoma's Brief in Opposition to the Petitioner's Petition for Writ of Certiorari, it is respectfully requested that the Application for a Stay of Execution of Death Warrant be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA



DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION
112 State Capitol Building
Oklahoma City, OK 73105
(405) 525-8550

ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

David W. Lee, of lawful age and being first duly sworn, upon his oath does state:

1. I am a member of the bar of this Court.

2. I served the above and forgoing Respondent's Brief in Opposition to Certiorari on all parties by placing copies in the United States Mail, First Class Mail, postage prepaid, addressed as follows:

Allen M. Smallwood
1310 South Denver Ave.
Tulsa, OK 74119

Jack Greenberg
James M. Nabrit, II
John Charles Boger
10 Columbus Circle
New York, NY 10019

Anthony G. Amsterdam
New York University Law School
40 Washington Square South
New York, NY 10012

3. All parties required to be served have been served.

Further, affiant sayeth not.

DAVID W. LEE

Subscribed and sworn to before me this 27th day of May, 1983.

NOTARY PUBLIC

My Commission Expires:
September 14, 1985

mag

Copy

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 29 1981
Ross N. Lillard, Jr.
CLERK

LARRY LEON CHANEY,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

FC 81-345

NO. CRF-77-756

RECEIVED
AUG 5 1981
ATTORNEY GENERAL
of Oklahoma

A transcript of the proceedings had and testimony taken in the above-entitled cause on May 1, 1981 before the Honorable Jay D. Dalton, District Judge in and for the County of Tulsa, State of Oklahoma.

APPEARANCES:

ALLEN M. SMALLWOOD, ESQUIRE,
Counsel for Petitioner.

S. M. FALLIS, JR., ESQUIRE,
DISTRICT ATTORNEY,
and RONALD SHAFFER, ESQUIRE,
Chief Prosecutor,
Counsel for Respondent.

DISTRICT COURT
FILED
JUL 1 1981
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

REPORTED BY:

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

APPENDIX "A"

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
S. M. Fallin, Jr.	5	32	33	--

+ + + +

E X H I B I T S

PETITIONER'S	DESCRIPTION	ENTERED
A, A-1	Cover Sheets	37
B, B-1, C, C-1, and D, D-1	Statements	37
E	Fire Dept. Document	40

Court Reporter's Certificate 56

Judge's Certificate 57

** ** ** **

P R O C E E D I N G S

THE COURT: For purposes of the record, this is CRF-77-756, Larry Leon Chaney, an application for post-conviction relief. It's Larry Leon Chaney, Petitioner, versus the State of Oklahoma, Respondent. All parties appear to be present.

It is my understanding, and Defense Counsel stated in chambers, he waives his client's presence for the purpose of this hearing. Is that correct?

MR. SMALLWOOD: I do, Your Honor.

THE COURT: Very well. Any witnesses that intend to testify in this case may stand and raise your right hand and be sworn at this time.

MR. SMALLWOOD: The only witness I have subpoenaed is Mr. Fallis.

THE COURT: Do you solemnly swear the testimony you are about to give in this cause now on trial will be the truth, the whole truth and nothing but the truth, so help you God?

MR. FALLIS: I do.

MR. SMALLWOOD: Very briefly, could I make a statement before I call Mr. Fallis, if I could?

THE COURT: Very well.

MR. SMALLWOOD: It's my understanding the Statutes of the State of Oklahoma in a post-conviction relief requires the respondent to respond within thirty days, a written response.

I'm fully aware it has not been thirty days yet.

However, it is set for hearing. If the State of Oklahoma has not filed a response, I move for judgment.

MR. FALLIS: We have a response. To relax any apprehension Mr. Smallwood may have, we ask to file it instanter.

THE COURT: It will be allowed.

MR. SMALLWOOD: I have a right to a copy, Judge, since that is just the original.

THE COURT: Yes, you should be presented a copy.

MR. SMALLWOOD: Could I have an opportunity to read the original?

MR. FALLIS: It is rather brief. I'll get one to him. I thought a copy was with that. I'm sorry.

Your Honor, I'll certainly furnish him a copy.

THE COURT: Very well. As a matter of fact, as soon as he reads it I'll have my bailiff run a copy for him right now, while we're proceeding.

Make sure that is filed today, the response of the State.

Counsel, would you like to give any opening remarks?

MR. SMALLWOOD: Very briefly, Judge.

As we discussed at the first setting of this matter, this application deals with alleged exculpatory evidence which was in the possession of the State of Oklahoma either during the investigatory stage of this case or immediately thereafter prior to the preliminary hearing, I think. Or at any rate,

certainly prior to trial. I'm not exactly certain when this evidence was provided the District Attorney's office. That is one of the reasons I'm calling witnesses in this case today.

As Your Honor correctly surmised last time, this deals with what has become a Brady matter, exculpatory evidence the State has in its file which has not been turned over to the Defendant, which evidence is material to the guilt or innocence or punishment.

I think after the conclusion of the hearing today, coupled with the application I've filed, the evidence will establish conclusively that such material, exculpatory evidence, was in the possession of the State of Oklahoma at least prior to trial, if not sooner; that a specific written motion was made for such evidence, in addition to certain oral requests made. The Tulsa County District Attorney's office either had actual knowledge of this exculpatory evidence or, as a result of the case law in the Statutes, to look for that and be aware of that.

Such material of exculpatory evidence was not disclosed to me, which denied Larry Leon Chaney a fair trial and due process of law.

THE COURT: Does the State have any remarks to give at this time?

MR. FALLIS: Your Honor, we have no remarks other than the same position we stated to the Court, I recall, in April of 1977 prior to the date of the trial when, I guess it

would be classified as a general Brady-type of request was made by Counsel; that there was nothing existing within the files or within our knowledge indicating any exculpatory material as to the guilt of the accused, and now convicted, Larry Chaney, or any matters that would be exculpatory relating to punishment.

That position was true then and it's true now. The filing of the application by Counsel has not changed that position. We know of nothing exculpatory in this matter.

THE COURT: Very well. The Petitioner may call his first witness.

MR. SMALLWOOD: We'll call S. M. Fallis, Jr., the Tulsa County District Attorney.

THE COURT: Mr. Fallis has been sworn to testify.

S. M. FALLIS, JR.,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMALLWOOD:

Q Sir, will you state your name and occupation?

A S. M. Fallis, District Attorney, District 14, Tulsa County, Oklahoma.

Q And you are employed as the Tulsa County District Attorney and have been employed in that office for approximately how long, sir?

A I've been in the office since June, 1960, the District

Attorney since January, 1967.

Q Will you state for the record, sir, what your authority is as the elected Tulsa County District Attorney?

A My duties and responsibilities and authority is set out in Title 19, which is to file and present charges to prosecute those charges through the various courts. In addition to that, we have responsibilities in civil areas to represent our local public officials within the county courthouse. There are other specifics, but, basically, that is it.

Q Does your responsibilities include filing criminal charges for violating the State Statutes?

A That is true under State Statute.

Q Is there any state office in Tulsa County, Mr. Fallis, other than yours who has any authority or responsibility to file criminal charges for violating the State Statutes?

A The assistants who work for me in an alter ego position have the same authority I do. That is only because the Statutes -- The office itself is the only one within District No. 14, Tulsa County, that would have that authority.

Q No other officer precedes your authority in this regard; is that correct?

A Other than the Attorney General's authority to file outer action under the particular section of the Statutes throughout the state.

Q Calling your attention to March 17, 1977, did you become

personally associated with, at the time, kidnapping, later murder charges, which related in the filing of the State of Oklahoma versus Larry Leon Chaney, CRF-77-756?

A I did.

Q Could you describe for the Court, please, sir, your role in this investigation prior to the murder charge being filed, but not in detail?

A I was first notified that there had been a kidnapping and extortion calls made to the home of Phillip Ashmore. I believe I was told somewhere around ten o'clock or eleven o'clock in the morning on the 18th of March, 1977.

Once I was advised of this I dispatched my chief investigavor to communicate with the local Federal Bureau of Investigation to see if this was a matter that might involve their area of responsibility.

Sometime later that same date - I could be a day off, but I believe that was the date - I did personally talk with Mr. Dale Williams who was the acting sergeant in charge of the local office of the FBI.

I again communicated with him by phone later that day, and it was sometime near the hour of midnight, a little before midnight, on the 18th, I believe, that I actually become involved in the sense of going to the office of the FBI. At that point, in a sense, I guess, took charge of trying to coordinate the efforts of the bureau, the District Attorney's

office, the Sheriff's office, the OSBI, the Highway Patrol and the Tulsa Police Department. That continued until the date the charges were filed and subsequent to that.

Q Is it a fair statement to say, Mr. Fallis, since you were in charge of coordinating the various law enforcement agencies and ultimately were the actual prosecutor, trial lawyer, for the State of Oklahoma in this case, that there is no one else in the Tulsa County District Attorney's office who has any greater knowledge or more superior knowledge than you as far as the details of the investigation of this case is concerned? Would that be a fair statement?

A I would say Mr. Shaffer probably has equal knowledge that I do because he worked beside me throughout this matter. My investigators worked beside me throughout the matter also, so in that sense they probably have equal knowledge to what I would have. It would be equal, I'm sure.

Q Would it be fair to say no one has any more knowledge or superior knowledge to the details of this case, greater knowledge?

A I stated the people I mentioned could. I guess with that amendment I agree with your statement.

Q Your response to one of my questions there was that there were many law enforcement agencies involved. Would it be a fair statement to say that the Tulsa County Sheriff's office, the Tulsa County District Attorney's office, the Tulsa Police

Department, the Oklahoma Highway Patrol and the Tulsa division or unit of the Federal Bureau of Investigation all worked conjointly in the investigation of this case to some degree or another?

A Yes, sir, I think that would be fair.

Q Is it not a policy of your office, as well as of the office of various other agencies you and I have mentioned, to share any and all information you receive regarding a case of this magnitude, or of this seriousness?

A As a matter of policy that would be my policy. I cannot speak for the other agencies. There have been instances and times when we did not share knowledge, but I'm not aware of that in this case.

Q At any rate, your testimony would be you did not impede any share of knowledge among the agencies?

A Most certainly not.

Q Are you aware of anyone else from any agency that might have done so, impeded or prevented the flow of knowledge from the various agencies, or between the various agencies?

A No, sir.

Q Mr. Fallis, have you been with the Federal Bureau of Investigation?

A Oh, no, sir.

Q You worked with the members of the Federal Bureau of Investigation, certainly, since you've been the Tulsa County

District Attorney, have you not?

A Yes, sir.

Q Could you describe to the extent you have knowledge what the procedure is for the Federal Bureau of Investigation as far as gathering investigative reports and turning over those reports to agencies for prosecution in the U.S. Attorney's office?

A I do not know their procedure, Mr. Smallwood. I can only relate to this case. If we restrict it to this case, there were reports submitted from that agency based upon the work they had allegedly done. As far as their policy or how they do that, I have no knowledge.

Q You have no knowledge that any evidence that they might have gained as a result of an investigation was not turned over to you as of this date?

A I have no knowledge of that in the term of evidence. Yes, I have no knowledge of that.

Q Can you recall just from your memory approximately how many FBI reports you personally saw in the particular case we're dealing with here, or estimate as to the volume or amount of material that was turned over to you by the Federal Bureau of Investigation from the time of the investigation, that it began, until trial?

A Written material, I would say probably - I'm just estimating - thirty-five pages, maybe. Something like that.

Q Would that have dealt solely with investigative reports of various agencies?

A To my recollection, yes.

Q Do you know what the policy is of the FBI, or what your policy is, regarding investigation of this nature as far as reducing statements of witnesses to writing? Is there any kind of criteria that you go by?

A I don't know the policy of the FBI, if they have one. So far as our office is concerned, if we have contact with a party who seems to have information that might be of value, normally, we'll try to take a statement.

Q And those statements are reduced to writing?

A Sometimes.

Q Has it happened in your tenure as District Attorney, Mr. Fallis, that statements have been made by witnesses that might put you on notice that information might be valuable to you, that that information be reduced to writing and later the witness changes his or her mind and decides a mistake has been made?

A That has happened, yes.

Q In effect, recanted what they had already stated?

A I never had a witness totally recant it, with one exception, in the trial of the State versus Jesse Weaver where Polly Weaver, his wife, got on the witness stand after communication with Counsel, apparently, and recanted her story she had given.

But as a practical matter in just general terms, it would not be unusual for a witness to say to me that "the statement I gave, I was off an hour on my time estimate. I thought it over, and I was off." Little details, but not totally recanting. I can't recall any one specific other than the Jesse Weaver case.

Q Statements reduced to writing, you would consider them to be an important statement to your case, and if a change was made in that statement would it be your policy to reduce that change or amendment of that witness' statement to writing?

A Not as a matter of policy. I might have them amend it. As an example, if we have a transcript of the court proceedings, I have them read that and I'll say, "If you find an error, mark it." If they have given a statement, I have them look at it and if they find an error I have them mark that. As far as taking another statement because of that, no, not necessarily.

Q Mr. Fallis, I want to hand you what has been marked for purposes of identification as Defendant's Exhibits A through D-1, consisting of eight pieces of paper stapled together, two-page reports a piece, and they purport to be FBI reports. I'll ask you if you have ever seen those before, sir.

I would ask in your answer, Mr. Fallis, to refer to the report by the exhibit number for the record.

A The very first exhibit, Defendant/Petitioner's A, quite frankly I have no recollection of having seen what would appear to me to be some type of cover page for an FBI report.

As far as B, C and D, Yes, I've seen those before.

Q Would that include D-1 and D-1 also, sir, the second pages to those?

A Yes.

Q In reference to exhibit A and A-1, as you stated, it purports to be a cover page for the compilation of reports from the FBI, and you stated you have no knowledge of having seen this specific report?

A No, I have no recollection. It may well be within the reports. It doesn't have any information that would be of any value on it.

Q Would it be a fair statement to make, Mr. Fallis, that you have seen cover pages like this before from the Federal Bureau of Investigation? Is this a standard format that is used, or do you know?

A I don't know.

Q This has various dates on it, Mr. Fallis, and at the very top there is a typed date of 4/5/77, a stamped date at the lower right of 4/11/77, lower of April 28, '77. Could you enlighten the Court and me as to what those typed dates or stamped dates might indicate, based upon your experience or these reports, or reports like these?

A I didn't prepare the report, I have no idea what they mean, other than I would be guessing, Mr. Smallwood, as to the top. I assume that 4/5/77 is the date their cover page was prepared.

That is an assumption. I have no idea.

As far as the stamped date on the bottom, it looks like it has been stamped like a set stamp of some kind. It is not one I utilitize. I don't know whether it is one that someone else utilitized. Maybe it is a date where someone received it, a clock-in stamp of some kind.

Q Referring to Exhibit A-1, it appears to be a typed statement by the then U.S. Attorney, Nathan G. Graham, indicating a copy of the report was being furnished to you as a aid to you in the charges of kidnapping and murder. Understanding you have no personal recollection of this particular coverage, would it be a fair statement to make, Mr. Fallis, if Mr. Graham was in fact doing as that statement indicates, you would have had this cover page in your possession prior to the preliminary hearing? Would that not be a fair statement?

A If it was included in the reports they gave, yes. I don't recall the date of the filing, but the incident where Mrs. Ashmore and Kathy Brown were missing began March 17th. It seems to me like charges were filed sometime around the 22nd, 21st, 23rd, something like that. I could be in error. I'm just shooting from memory.

If that were true, this happened March 17, 1977, yet this report wasn't made until April 5 of '77, or received by somebody on April 5th of '77, and then stamped April 11, '77 and again received April 28, '77. The only thing I could conclude,

apparently this was prepared after I filed charges. If I'm correct, charges were filed sometime around the 21st, 22nd of March.

Q Referring to exhibit B and B-1, C and C-1, D and D-1, you stated, for the record, you have seen those, or originals or copies, of that exhibit before. Will you state for the record what those are, sir?

A Yes. These are reports, copies of reports, that were made by, apparently, agents of the FBI concerning evidence in the investigation of the kidnapping, extortion and murder of Mrs. Ashmore and Kathy Brown.

Q Mr. Fallis, your office apprised me of names of individuals making the reports in the exhibits, but the exhibits I handed you and you have in your hand, someone has X-ed out or blocked out the names of the individuals making the statement, as well as any reference to the particular FBI agent that was gathering the information. Can you tell me now the names of the FBI agents that took the statements of any of those witnesses, from memory? If not, can you get that information for me?

A From memory, I'm trying to recall. Perhaps it should be understood, Mr. Smallwood, if I could give some description of the way this investigation was conducted it might answer some of your questions that you have.

Q Certainly, certainly.

A As we were hoping to find and locate these ladies, and

hopefully they were not deceased, the representatives of the FBI and primarily each of the agencies I've mentioned would meet continually. We met continually in my office over this period of time, and as matters would come to our attention - As an example, through phone calls, through contacts - various people would be dispatched.

I recall Mr. Brewster of the FBI was the man who was physically present, although I'm going to have to assume he dispatched other people to do work that I requested of them. "Could you check this out, could you check that out," and so on.

Any time you have the type of investigation where you have various agencies, I personally have no recollection of who would have been the person actually doing it. I'm looking at Exhibit B and B-1.

Q That would be Defendant's?

A Yes. My recollection would be this involves an interview of a person by the name of Hamilton. I do not have a recollection as to the agent who allegedly would have made the interview. I do recall, however, that a Tulsa police officer by the name of Tom Nolan also interviewed Hamilton.

With reference to Defendant/Petitioner's Exhibit C and C-1 I do not recall the name of the boy that saw a red truck near 91st and Memorial, and I have no recollection right now as to who might have received that information.

Concerning Petitioner's D and D-1, relating to a lady, her

name was furnished to you. Again in this instance, I have no recollection. I might be able to find out, but I have no recollection of it.

Q Regarding Defendant's B through D-1, can you state for the record, Mr. Fallis, to the best of your memory when those reports came in your possession and when you became aware of the information contained therein?

A Okay. I again am operating on an assumption, and I think it is fairly accurately.

The lower left hand corner of the first page, Defendant's B which is attached to B-1, there is "Interviewed on 3/18/77," March 18th, 1977. I think it would be fair and accurate, and I would assume, I was apprised of that somewhere near that date when that interview took place, because it is necessary when you are in the investigation to evaluate the information that is being received, and that was done in this case.

With reference to Defendant's C and C-1, I do not see a date on this as to a date of interview -- excuse me, there is one date alluded to. There is a date of March 21, 1977, and I would say I must have been apprised of that on or near that particular time, again, as part of the investigation or within the confines of the investigation.

As to D and D-1, the interview date shows March 22nd of '77, so I would assume either on that date or sometime shortly after that date I would have been apprised of that, again,

within the setting or confines of the structure of the investigation.

Q Mr. Fallis, do you have any personal recollection of actually either reading these reports or hearing an FBI agent orally tell you what these witnesses said, and if so could you put a date to that?

A I'm sure I've read these reports not once but several times, and I have no way to put a date on that. I am confident they were discussed also. Again, I have no date I can utilize other than utilize the interview date because as these matters were being done they would be relayed back to what was then being called - I think by the news people rather than by law enforcement - the command center, and utilized for any investigative leads they might have.

MR. SMALLWOOD: If the Court please, for the record, one of the witnesses, Mr. Pregler, has entered the courtroom. I have no objection to him being in here, but if the State wishes to exclude him they can. He is here to testify to business records from the Jenks Fire Department.

THE COURT: He may remain, if there is no objection.

MR. SMALLWOOD: Thank you, Your Honor.

BY MR. SMALLWOOD:

Q Mr. Fallis, were you aware of any statements whether made orally to investigative officers or possibly reduced to writing which could be construed as a recantation or a denial of any of

the information contained in Exhibits B, B-1, -- D-1 prior to September, 1977?

A No, -- You mean by the author?

Q By the witness.

A No, I'm not aware of that.

Q Mr. Fallis, you lecture nation wide, it is my understanding, as an expert or a well known lecturer on criminal law and your duties of District Attorney and prosecutor are in areas regarding this, do you not, sir?

A I'm not sure I understand your question.

Q Bad question, maybe. Are you not a teacher or lecturer?

A Maybe I can clear it up. I didn't know if you mean talking in terms of reports or something like that.

Q Generally speaking.

A Generally speaking, the matters I have been asked to speak on would deal with trial techniques, matters involving adversary hearings in the courtrooms, not on report preparation.

Q How long have you been a teacher or lecturer in this capacity, sir?

A I'm thinking five, six years, something like that.

Q Can you give an estimate for the record how many teaching seminars or lectures you give annually?

A This year - I'll say the last twelve months - I think three, four, something like that, within the last twelve months. Some years there would be none, some years, perhaps, more than

that. Again, it depended upon when the College of District Attorneys would call on me. There would probably be four seminar-like affairs average, I would say, on a yearly basis.

Q Can you say how many states, other than Oklahoma, you have given these seminars?

A In excess of twenty.

Q You are aware, sir, of the prosecutors' obligations or duties regarding what has become known as Brady material, referring to the case of Brady v. Maryland, are you not, sir?

A Yes.

Q Could you briefly state into the record what your understanding of that obligation is?

A My understanding under that particular statement of case law, the prosecutor is obligated to make known to the defense any exculpatory materials, which, basically, is any material that would tend to negate or be indicative of an accused, or mitigate, perhaps -- having some mitigation toward punishment.

I can't recall the year of the case, but it was in mid or early 1960s that that particular matter was decided. It has been the continuing law since then.

There seems to be some debate that the prosecutor responding to specific requests as opposed to the Brady motion. I might say, our policy has been to assume that obligation whether a request was made or not.

Q A written request was made by me, filed in this case in

which it went to general material and certain specific material, did it not?

A You filed a request and followed it up later with an amended request.

Q Did you peruse your file, or direct that be done, to see if any exculpatory evidence might exist?

A I did, sir.

Q I take it, you came to the conclusion that none was there or given to me other than what was given to me as required by law? None existed?

A I found nothing other than the exculpatory materials you were given that you specifically asked for, which was allowed by law, the medical records, the scientific records, which you certainly were entitled to.

I did not see anything exculpatory, nor have I discovered anything since.

Q Have you ever lectured or taught, sir, at any of these seminars regarding prosecutor duties under the Brady concept? Has that ever been a subject of your teaching?

A No, sir. It has been alluded to. I may have mentioned it, but it has not been a subject.

Q Do you recall, sir, a conference in your office in which you and Mr. Shaffer and myself were present wherein I asked you if you had any knowledge or any information regarding any I.D. witnesses that would place Larry Chaney with either of the

victims in this case, or these cases, or the truck of the Ashmores at any time? Do you remember me asking you that question?

A I can't recall, it may have been. I do not recall it specifically. If it occurred -- I assume from your question you are taking the position that it occurred?

Q Yes, sir.

A I'm not aware of anybody we had that put Larry Chaney, nor am I today, with Mrs. Ashmore that was presented during the course of the trial, or with the Ashmore pickup truck, or any of the materials you have alluded to. If it occurred, my answer would be the same today as it would have been during our conversation, I assume.

Q Do you also recall if you had any eyewitness testimony that would put these women with anyone else or any place that would tend to negate his guilt or mitigate his punishment?

A I don't recall that. If we did, my answer would be that I did not.

Q If I asked those questions, your answers would have been no to both of them?

A Yes, sir.

MR. SMALLWOOD: May I have just a second, Your Honor?

THE COURT: Very well.

BY MR. SMALLWOOD:

Q Mr. Fallis, I'll ask you, could you state for the record

why you feel the material contained in Defendant/Petitioner's Exhibits B through B-1 is not exculpatory?

A Okay. Starting with Petitioner's Exhibit B, and I'm going to exclude A and A-1 because it does not contain specific material. Beginning with Defendant/Petitioner's B and B-1, which I recall to be the report referring to Mr. Hamilton who said that he, on the date, according to this report - I believe it was the 18th of March, 1977 - observed a pickup truck. And the manner in which the report is written, it would seem to indicate that -- I'll read the words because I think this is important here, "advised at approximately 7:30 A.M. he went outside of his residence, which is located about one-quarter mile from the above intersection, and fed his stock. He stated he then drove up to the rent pasture, and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building... stated this occurred between eight o'clock and 8:30 and was positive on the time."

Then he later states it was the same truck that was parked there at the present time in the same location. As I go back in memory, and did at the time, it would certainly have been the Ashmore pickup, which was in fact found abandoned at 91st and Memorial.

That particular report, on the surface, may appear to be something of value to either the prosecutor or anybody, if you

ignore other reports. But the truth of the fact is, the truck had been discovered parked there thirty minutes to an hour prior to the time Mr. Hamilton even saw it, based on the testimony of an employee of Mr. Ashmore, at least a private contractor who was working for Mr. Ashmore, which was long before that man who said he was positive of the time. So there would be no relationship of his observation, other than the fact he may have seen Mr. Garby (phonic) get out of his car and look at the pickup, and then drove to Mr. Ashmore's home to alert him to look on 91st.

You have to look at the report in any investigation in relationship to the overall picture. YOu can't just pick out a piece and say, "This is good, bad or indifferent." That relates to Exhibit B and I find nothing in that. When I considered that coupled with the totality of the evidence in this case that indicated nothing in the way of exculpatory information.

Concerning Petitioner/Defendant's C and C-1, a two-page report of some youngster in the Jenks Public School, who, according to the report, around four or 4:30 P.M. on the date of the 17th of March noticed a new looking red pickup truck with a white stripe across it, and he said he noticed it because it was shiny red and he observed a clip-on type CB antenna. He later saw it sometime around 5:30 P.M. when he was going to soccer practice.

Later in the same report, on March 21st by telephone an

agent unknown to me, apparently, contacted the school bus driver, who confirmed that the school bus this youngster was supposed to have been on did in fact make turns at the intersection of 91st and Memorial.

It might be interesting that there was a red pickup truck at 91st and Memorial, but Mr. Ashmore's is blue, a blue and white pickup truck, and has totally no relationship to the case.

Also, again looking at the entire record and testimony of the agents, the Ashmore truck had to have arrived at the scene of 91st and Memorial subsequent to the - We'll say to the time or during the time - of the rain storm, based on scientific evidence that was produced at the trial. Again, that had nothing inculpatory or exculpatory. From the prosecutor's standpoint it would tend to be exactly what my thoughts are now, probably Larry Chaney or an associate drove it there at that time.

Petitioner's D and D-1 concerning Poppy Weaver - I think that's what you told me her name was - it is my recollection, she could not with certainty identify this person as being Mrs. Ashmore. As a precaution, based upon having received your notification in this case, she was talked to again by an investigator from my office. Her response was, "I couldn't identify the woman now, I can't identify her now." So, again, I find nothing in those reports that is exculpatory.

Q Has it been your experience, Mr. Fallis, FBI agents in accumulating reports conduct themselves in such a way as to

make those reports as accurate a compilation or accurate reproduction of oral statements they have been given by the witness as they possibly can make?

A Well, my experience, I would say I'm sure all people try to do that. I don't know, I have no way of knowing how accurate they are from time to time. That is why, again, you have to look at them in view of the totality of the evidence to see. As an example, if I had a report that said Mrs. Ashmore was seen on March 30, 1977 walking down the street in Sallisaw, Oklahoma, then I would say, "Gee, based on the fact that she was found in a grave prior to that time, then that person must be in error.

That is the same process you go through as you look at reports. You realize there are reports that, you know, cannot be accurate, even though a person may think she sees something.

Even in these reports, even if what they said was correct or true, which I don't; No. 1, I don't think the red pickup truck in any way, under the examination, had any relationship with the case. Mr. Hamilton, he is probably a very fine man, but in error if he thought the truck was being driven up by Mr. Garby, well, Mr. Garby had already discovered the truck. He didn't drive it.

The lady, Poppy Weaver, she, by her own statement to us and by discussions within the office, was not sure. I'm satisfied it was the lack of her ability to be sure that it was

reliable or admissible evidence, and we have to deal with what we would have for admissible evidence.

Q Mr. Fallis, I asked you a prior question regarding the recantation or denial of any statements contained in Defendant/Petitioner's Exhibits. Ms. Poppy Weaver's statement contained in D and D-1 indicated she wasn't certain when she was in your office. Was that just recently?

A No, I didn't say she said she wasn't certain. I'm saying during the discussion with the agent, trying to decide which move to make and where to look and so on, it was during that time it would havebeen normal that we look at that and say, okay, to evaluate, to find out, "Does this person know?"

Within the time subsequent to receipt of your application for post-conviction relief, I assigned an investigator to talk to her again. I think this was after the time you had been furnished the name by Mr. Shaffer.

Q I think it was prior.

A Whatever the date was. In any event, I'm relating as far as what she said to me at that time, which recalls to my memory the evalua ion that would have been made back then, and that is that the lady was trying to be helpful, but apparently couldn't be.

Q The fact is, the only written evidence in your files of the statement of Poppy Weaver, Exhibit D and D-1, that is the only written one?

A The only written one, yes, sir.
Q You stated, Mr. Fallis, in answer to one of my questions that Mr. Chaney and his associate did something.
A I said, in my mind I could assume that. Again, I was making reference to how the truck got there that was ultimately recovered at 91st and Memorial. I'm sure it didn't materialize.
Q Are you stating, for the record, it is your opinion that Mr. Chaney had a confederate?
A No, sir. I'm saying I have no evidence as to whom put the truck there. That's the point I was trying to make. Whether he did or not, I don't know.
Q Isn't it a fact, Mr. Fallis, no one knows exactly, or no one testified at the trial of this matter -knows exactly when Kendall Ashmore and Kathy Brown was kidnapped, the exact time of the day?
A No one that testified, no, sir.
Q Isn't it a fact that no one that testified on your investigative team knows the exact time of death of both Mrs. Ashmore and Miss Brown?
A Well, the only way I can answer that, Mr. Smallwood, would be within the perimeter as established by Dr. Hoffman in his testimony. That would be the --
Q As an exact time, nobody can testify to that?
A Somebody can testify to that.
Q Obviously, the person that killed them could.

A I think he could, yes.

Q In fact, wasn't the time of death a very hotly contested issue?

A Well, one of your witnesses, a doctor in a Texas hospital whose name escapes me --

Q Dr. White.

A Dr. White, I think was the witness that you presented adverse to Dr. Hoffman's concerning the time of death.

His testimony, I think, could be described as an effort to impeach Dr. Hoffman's conclusion as to the time of death, and the State presented rebuttal by Dr. Fogel who reaffirmed Dr. Hoffman. It was as a whole contested, but, yes, it was an issue.

Q Your theory as to the time of death was crucial to your success and the maximum sentence in this case, in your opinion?

A No, sir.

Q It was not crucial?

A No, sir. What was crucial, Mr. Smallwood, was that the jury found beyond a reasonable doubt that Larry Chaney was involved in the kidnapping and death of Kendall Ashmore.

Q As I recall, Mr. Fallis, the State of Oklahoma presented no eyewitness testimony that placed Mr. Chaney with either of the victims in this case, or on the Ashmore property, or in the vicinity of the Ashmore truck; is that a fair statement? at any time.

A That no witness put Larry Chaney with them?

Q Yes.

A I'm not aware of any witness.

Q If you had a witness that could testify that could have placed Larry Chaney in the vicinity or company of Kathy Brown or Kendall Ashmore, or in the vicinity of the Ashmore truck on March 17, 1977, would you have presented it to the jury?

A Yes, sir.

Q Why would you have done that?

A I think it is very material from the standpoint that if you have reliable evidence of putting them together it would have been material.

Q Would it be, in your opinion, material to the defense if the defense could have presented an eyewitness that could have placed, say, another male individual in the company of Kathy Brown and Kendall Ashmore during the same time frame? Could it have been?

MR. SHAFFER: Judge, we object to what it would or could have been. We could go on all day with what could have been or would have been. If they had a bird dog maybe they could fly.

THE COURT: Sustained.

MR. SMALLWOOD: If the Court please, if I could, Judge —

THE COURT: It's outside the scope of evidence presented

so far.

MR. SMALLWOOD: Well, maybe the phraseology, but in U. S. v. Agurs it deals with whether or not that could have been exculpatory or could have affected the outcome of the trial. That is why I phrased --

MR. SHAFFER: It's assuming a set of facts not in evidence.

THE COURT: Sustained. I have the Agurs case here, and I've read over it with a fine tooth comb --

MR. SMALLWOOD: If the Court please, if you sustain that I'm going to make an offer of proof that if Mr. Fallis could testify he would testify that if the defense could have placed another individual, say another male, in the presence of either Kathy Brown or Kendall Ashmore, or the Ashmore truck during the crucial time periods on March 17, 1977 that would have been very beneficial to the defense, both as to the determination on guilt or innocence and mitigation of punishment, and would have harmed or damaged his case.

MR. SHAFFER: We object to the offer. I don't know where he is getting all this.

THE COURT: Sustained.

MR. SMALLWOOD: Very well, Judge, the record is clear on that. I believe that's all I have.

THE COURT: Does the State wish to inquire?

MR. SHAFFER: Yes, Judge.

CROSS EXAMINATION

BY MR. SHAFFER:

Q Mr. Fallis, do any of these reports indicate who that person was, assuming this woman could positively identify Mrs. Ashmore - who that person might have been in the truck?

A No, sir.

Q Did she ever indicate it was Larry Chaney?

A No, sir.

Q Or that she could even identify any of the people she thought she saw in the truck or around the truck?

A No, sir. As a matter of fact, I think the one report, as I read it a moment ago, seems to negate that.

Q Do any of the reports indicate in any manner that Larry Chaney did not kill Mrs. Ashmore?

A No, sir.

Q Is there anything in there that says anyone other than Larry Chaney killed Mrs. Ashmore?

A I'll answer that question by stating, from the time we became - By we, I mean myself - involved in this matter to this date as I sit here, I have not seen any piece of evidence that is contradictory or contests the guilt of Larry Chaney. If so, I would advise the Court and advise Counsel.

Q As far as how the FBI presents their reports, did you often get reports from the FBI?

A Not very often.

Q These matters that he's talking about, these three different people were checked out back during the course of the investigation and also later after Mr. Smallwood filed his post-conviction appeal; is that correct?

A That is correct, sir.

MR. SHAFFER: Judge, I believe that's all.

MR. SMALLWOOD: Very briefly, if I could, Judge.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. SMALLWOOD:

Q Mr. Fallis, you testified these people who gave the reports were checked out during the course of the investigation, and you still stand with your answers to my questions. However, you have yet to receive any recantations or denials that would countermand the statements contained in these written reports, which are exhibits before the Court.

A With the exception of Poppy Weaver, there is no recantations. I think it was rearmament as to what was determined by matters outside the statements. As an example, if during the course of the investigation of any kind, particularly this investigation, if the investigator came to me and said, as an example, "Allen Smallwood has information that he thinks might be helpful on the matter," and they bring me a statement of yours, and I'd say, "We better check that out." Somebody comes back to talk to you and in talking to you it really is not

relevant, the report would remain but it would be set aside because it would not be valuable.

In this case, with the exception of Polly Weaver, there was no recantation. She recanted after you filed for post-conviction relief.

In my memory - I think that is exactly why it was not considered to be valuable information to us or anybody—she couldn't identify them. That certainly was not recanting.

As far as the little boy, we didn't make any additional contact to the little boy then, to my knowledge, or now. It is of no value that somebody saw a red truck on that particular date. I don't know what that would have to do with the matter for a lot of reasons; 1, it is a different colored truck and the little boy, according to the little boy, was sure of the coloring and that the red truck was at 91st and Memorial during that period of time.

It was generally discussed during voir dire and jury selection that that is used many times for a parking place for people who might want to pool their automobile and drive to various areas.

As far as Mr. Hamilton is concerned, he was contacted again for two reasons. Mr. Nolan with the police department talked to him. It would have been extremely important to the prosecution if the man could identify the man bringing the truck up there.

We determined then, and I'm satisfied now, that he in fact saw the truck when the gentleman I mentioned earlier - His name escapes me right now - in any event, was examining the truck, or at least looking at the truck prior to alerting Mr. Ashmore. The time is wrong and totally off.

Secondly, with Mr. Hamilton, Mr. Nolan noticed he was a man of extreme age and had great questions concerning his ability to relate past experiences.

Q These decisions were all made by you in evaluating the weight of the evidence af far as being beneficial to the prosecution?

A No, sir, made by myself in conference with other people. But, Mr. Smallwood, I say this with no sense of trying to sound, or being, impudent to the Court or to you, it doesn't take you or your application to remind me of my obligations ethically. I was fully conscious of them at that time, and I am now.

In consideration of those matters, if I found things that meant Larry Chaney was not guilty I would be the first to come forward, and you should be quite aware of that in your dealings with me and this Court, and quite certainly if it happens, if anything ever came forward it would be known by the Court and by you.

Q Would it be a fair statement to make, Mr. Fallis, that you in your profession and in your job as the Tulsa County District Attorney are not or would not be the most objective person to

make that determination as to whether evidence is exculpatory or not in a case of this nature?

A Well, I don't know, Mr. Smallwood, I try to be objective. There are a lot of cases we don't file even if we think the people are guilty because we don't rely on questionable evidence. There are cases we dismiss because we entertain reasonable doubt, cases we have not proceeded with.

As a matter of fact, you mentioned my lectures. One of the basic rules I advise prosecutors in the states where I've appeared, if you have, based on the law and the evidence, any doubts, not just reasonable doubt but any doubts, you should not proceed with the case.

Q My question, Mr. Fallis, would it not be a fair statement that you would not be the most objective, while in the heat of the investigation or heat of the prosecution of a case?

A I guess you're asking for a subjective answer concerning the question about objectivity. My answer --

Q That's right.

A My answer would be, more objective than defense lawyers. There concern is onefold, to protect the rights of their clients. They have an obligation to look, search and find exculpatory evidence. We have a duel concern, to not only search out inculpatory but also to search out that which may be exculpatory.

Q Would it not also be a fair statement to make, one individual might consider information is not exculpatory and a

judge might consider the evidence to be exculpatory, or lead to exculpatory? Isn't that possible?

A I'm sure there are difference of opinions on most things, yes, sir.

MR. SMALLWOOD: That's all I have.

THE COURT: Any further questions?

MR. SHAFFER: I don't have anything.

MR. SMALLWOOD: If the Court please, I move to enter in evidence Exhibits A, A-1, B, B-1, C, C-1 and D, and D-1.

THE COURT: Any objections?

MR. SHAFFER: No objections.

THE COURT: They will be allowed in evidence. They will be filed in the case.

(Said documents so marked and filed as Defendant/Petitioner's Exhibits A, A-1, B, B-1, C, C-1, D and D-1.)

THE COURT: For purposes of the record, I want to ask Mr. Smallwood — Mr. Smallwood, you have been supplied with the names of all these individuals, have you not?

MR. SMALLWOOD: I have been supplied with all the names of the individuals making the statements. I have not been supplied with the names of the FBI agents conducting the interviews and taking the statements. I would like, though, if I could have them.

THE COURT: I assume you have talked with the individuals that you were supplied the names of. Have you had the opportu-

ity to talk to any of them?

MR. SMALLWOOD: Yes, I have.

THE COURT: Could you tell me which ones you've talked to?

MR. SMALLWOOD: I've talked to Mr. Hamilton and I talked to Poppy Weaver at her place of business, and I talked to Mrs. West. I did not talk to Coil. (phonic)

THE COURT: And you haven't called any of those as witnesses here today; is that correct?

MR. SMALLWOOD: I have not.

THE COURT: Is there anything further, anything additional?

MR. SMALLWOOD: There is Mr. Pregler.

(A brief discussion was had off record.)

MR. SMALLWOOD: At this time petitioner and respondent are going to enter into a stipulation regarding Mr. Pregler, P-r-e-g-l-e-r, whose occupation is appointed fire chief of the City of Jenks; that if he were called as a witness he would identify Exhibit E and would state that that is a copy of a Jenks Fire Department Fire Incident Report, which is held in the normal course of business for the Jenks Fire Department.

He would further testify that the report indicates that a fire alarm was made at 4:08 p.m. on March 17, 1977 in Jenks, Oklahoma at the Jenks Fire Station, of which there is only one, and a response was made by the Jenks Fire Department,

and that the response was made, or that the fire engineers arrived at the place of the fire at 4:11 p.m., March 17, 1977.

Mr. Pregler would further testify although he has no personal knowledge the exact route the fire trucks took; that in his opinion the most direct and logical route would be to go down Main Street in an easterly direction, which would have taken the fire trucks past the Wells' Grocery Store where Ms. Poppy Weaver indicates in her statement, Exhibit D and D-1, she saw Kendall Ashmore, and Ms. Weaver further indicates in the report she is certain of the day and the time because in addition to picking up her child at school at four o'clock and driving immediately to the store, the fire trucks went by and, I believe, two police cars went by at 4:10 p.m., March 17, 1977.

MR. FALLIS: Your Honor, we can enter into the stipulation. The manner of the wording creates a little problem for me insofar as Counsel's statement of Ms. Poppy Weaver identifying Kendall Ashmore. I think that is in issue here, insofar as reference to her statement --

MR. SMALLWOOD: Reference to her statement?

MR. FALLIS: It is related to her statement.

MR. SMALLWOOD: All right, whatever is contained in Exhibit D and D-1.

THE COURT: Very well, the stipulation will become part of the evidence at this time.

MR. FALLIS: Your Honor, I might make it as clear as we can. With reference to the stipulation that Counsel, I assume was relating it to, the statement that is, or the reports that are, marked and introduced as Defendant's or Petitioner's Exhibit D and D-1 --

MR. SMALLWOOD: The purported statement of Poppy Weaver.

MR. FALLIS: That is correct, her reference to that in her statement?

MR. SMALLWOOD: I would like to have this marked as Exhibit E, if I could, and ask it be admitted into evidence.

THE COURT: Very well, it will be allowed in evidence at this time. It has been marked.

(Said document so marked and filed as Defendant/ Petitioner's Exhibit E.)

THE COURT: Does Counsel for the petitioner have any additional evidence?

MR. SMALLWOOD: I do not, Your Honor. We rest.

THE COURT: Does the State have anything they would like to offer at this time?

MR. FALLIS: No, Your Honor, the State has nothing to offer, other than we would like to be heard on the matter.

THE COURT: The petitioner may be heard at this time.

MR. SMALLWOOD: Your Honor, without going into great lengths to the law involved, it is rather convoluted, a

great amount of case law. Brady v. Maryland, basically as I understand the law today, Bardy is still good law, but it is qualified to a certain extent by the case of U. S. v. Agurs.

U. S. v. Agurs, as I understand it, deals with the degree of materiality that a petitioner must show based upon the type of request, or the absense of the request, that is made regarding what has been known as and called Brady exculpatory material. The more specific the request made by the petitioner, the mless degree of materiality he or she must show in order to show a violation of due process that falls in the 14th Amendment to the United States Constitution.

I feel, based upon the written reports in this case and the statements from Mr. Fallis, that while he may not specifically recall me asking for specific information of this nature, he doesn't necessarily, as I remember his testimony, deny that occurred and indicated it had in fact occurred. His statement would have been no, that the State doesn't process any such material.

I feel that a specific request on the type three cases, U. S. v. Agurs, has been met. I feel the type two cases in U. S. v. Agurs has been met, therefore, I feel the only burden the petitioner must show, or this petitioner must show, is the purported evidence could have been responsible, or could have altered the verdict of guilt or innocence, or could have been a mitigating factor on the punishment section on this

trial. Taking into consideration that this was a capital murder case, I feel that burden certainly has been met.

If I could, Your Honor, I would like to very briefly go through the exhibits attached to the application and make reference to them. I think we can assume, and I think it has been testified to, that all the material contained in Exhibit B, B-1, C, C-1, D, D-1 were in the hands of the Tulsa County District Attorney, and he had knowledge of those, at least prior to trial of this matter in December, 1977.

Exhibit B and B-1 indicate that a pickup truck, which is described as being similar, if not exactly like, the Ashmore pickup truck, arrived at 91st and Memorial on the morning of March 18, 1977. That is in direct contradiction to the testimony of Agent R. T. Robison, who testified at trial, beginning at page 481 in the trial transcript and continuing thereafter for some 15, 20, 25 pages. Mr. Robison, I think we can assume, had the information contained in Exhibit B and B-1 in his possession. Yet he nonetheless testified in his opinion that on Thursday, March 17, 1977 - It might be stretching the point to consider it perjury testimony - the Ashmore pickup was there, yet he had evidence indicating just the contrary.

If in fact the Ashmore truck had not been there Thursday, March 17, 1977, the State's circumstantial theory of the case, in my opinion, would have certainly had to change. It was material. They needed to have that truck there. They

needed to have Larry Chaney placing that extortion call approximately two hours after he made that long distance telephone call to Sequoyah, made the call at 4:39 on Thursday, March 17, 1977.

The statement of the individual contained in the Petitioner's/Defendant's Exhibit B-1 said it could or could not be Larry Chaney. It is very vague and very general, but does not necessarily fit his description.

In Exhibits C and C-1, once again the statements contained in those exhibits are directly contrary to the testimony of Agent Robison, who said in his opinion the truck had been there since Thursday. The statements in C and C-1 said there was a pickup truck, but not the blue Ashmore pickup, it was a red one.

Once again it confirms that Agent Robison was either engaging in a fantasy about when the truck appeared there, or was directly testifying when there was in fact no truck there, at least the Ashmore truck was not there because an eyewitness placed another truck there on that afternoon and it was a different truck than the Ashmore truck.

I think the most substantial piece of evidence is obviously contained in D and D-1, which placed Kendall Ashmore in Jenks, Oklahoma at 4:10 in the afternoon of March 17, 1977, 110 miles away, and only an half hour's time away from Larry Chaney unquestionably making a long distance telephone call

from Sequoyah, Oklahoma. He certainly cannot be in two places at one time. I think the statement would even indicate that Ms. Weaver said she saw Kendall Ashmore in the truck. I don't care who it was. Based on the State's own theory of the case, it could not have been Larry Cheney.

In my opinion, it is extremely exculpatory as to the guilt or the mitigation on punishment. It could indicate another individual would have had to be involved. More than likely, according to this statement (indicating), another individual actually killed Kendall Ashmore and Kathy Brown. The witness' memory as of May 1st, or the month of April, 1981 is not material to this hearing. The only thing that is material to this hearing is whether or not the State had material exculpatory evidence in their possession which was denied us after making a specific request for the same.

I think taking all this material into consideration there is no way that - Your Honor is extremely zealous in protecting individual rights, particularly an individual that received the death penalty -- I can't conceive your telling me that, Your Honor, in sitting in on the hearing of this matter on a nonjury basis, after hearing that information that has been presented to you today, if you were the trier of the facts, that it would not bear heavily on your mind before coming to the decision of guilt or innocence, and certainly before sentencing the individual accused and certainly not sentence that individual

to death.

I ask that the conviction and judgment be set aside and a new trial ordered, and/or if the Court feels that the evidence is not of sufficient materiality to do that, at least modify the sentence imposed. Thank you.

THE COURT: Mr. Fallis.

MR. FALLIS: Your Honor, I reviewed the application made by Counsel and it is actually addressing maybe two points of law, so I think for that reason we should address ourselves to those two points; one being, first of all, the nature of how the Court is to test what has been alluded to by Counsel as information, or newly discovered information, in the sense of being exculpatory, or perhaps not exculpatory, and certainly the guiding and controlling case on this point is the Agurs case that has been cited by Counsel in his own brief in support of his application.

The other point is Title 22, Section 1080, Subsection b, which is part of the application insofar as the new trial request based upon newly discovered evidence, so I think his application is in two parts in this sense. In all caution I think we should address ourselves to both.

First of all, I want to take the second point, that is the so-called newly discovered evidence. In that section of law it says if there exists evidence of material facts not previously presented and heard, then that may be the basis for

a Court to grant relief under post-conviction procedures.

In this case, it would be the State's position that there has been nothing in this hearing, nothing introduced now that's not in the Court's knowledge, having presided over the trial of the case, that involves material facts not previously presented, and this, of course, rests upon the determination of material facts and not investigative leads that were checked out, as obviously was the case here.

The law in Oklahoma, insofar as new trials are concerned, the mere fact something might have been determined is not in and of itself the basis for a new trial. As a matter of fact, under the evidence as submitted by Counsel today, there has been nothing presented here that is new. It is of interest, and should be of interest, to the Court that Counsel does not contest Poppy Weaver's statement, apparently, to my office subsequent to his application being filed. She could not then nor can she now identify anybody such as Kendall Ashmore. So under relief of 1080, Title 22, I think the application is not supported under the evidence in this regard.

Now, concerning the other point, the language of the United States v. Agurs, as cited by Counsel, I think, sets out the rules for our purpose here. I would say now as I said on the witness stand, we have an obligation, even without a request, even without a specific request, to make known to the defense exculpatory material. So I'm not bothered by the three levels

of what Counsel perceives to be requests based on the Agurs case. Let's assume, for our purposes here -- I adopt the theory of ethics in law: If there is something exculpatory, with or without a request, I have an obligation to turn it over, and that was the testimony I gave today, and that is the testimony I would adopt for argument purposes also.

In that regard, it requires me to look for something in the way of exculpatory material, it requires that in fact that if there is something exculpatory to the accused's guilt and perhaps even insofar as having some bearing upon punishment that could be meted out following a conviction, I must give that to the defense.

I call Your Honor's attention to the language in two parts of that decision that I think are very, very important. On page 2400 under the numbering of No. 5, the language in the last paragraph says that the mere possibility that an item of undisclosed information might have helped the defense or might have helped the outcome of the trial does not establish materiality in the constitutional sense.

I would submit to Your Honor that the Court in Agurs is saying, even if there existed an item of undisclosed information, standing alone it would not be sufficient for the Court to find there had been some constitutional denial of due process of a fair trial.

I would say, based on the evidence here, there is no

showing of any possibility that the outcome of this trial would have been affected, and, therefore, it doesn't even rise to that level.

I would call Your Honor's attention also to the language in the same decision on Page 2402 under No. 11, the last paragraph. "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." That raises the question, have you heard anything that raises in Your Honor's mind a reasonable doubt as to the guilt of Larry Chaney in the kidnapping and death of Kendall Inez Ashmore. I think the answer is obviously nothing.

Even if we assumed that Poppy Weaver in this report was actually sure, as Counsel has represented to the Court, and I submit he is not making a fair representation to the Court, he talked to her and didn't take issue when she said she could not identify anybody then or now. Yet he says she can because that is material to him. Even if we assumed that, that would not make any difference insofar as the Court is concerned. Even if she said she saw, and this is an assumption, Kendall Inez Ashmore in that truck, that would make no difference in view of the evidence here. But she didn't, based on the evidence presented.

The little boy in the school bus, I have no doubt the boy saw a truck parked there, and red and white truck. If you

will recall the evidence in this case, there is no evidence about a red and white truck. It has no materiality to the issues. Does that raise any reasonable doubt in view of the totality of the evidence, and under the Agurs case that is how the Court must measure this.

Now, Mr. Hamilton, Counsel misstates Mr. Hamilton's own statement that he now claims is exculpatory. He has Mr. Hamilton seeing a truck arrive there sometime before the rain storm on the evening of the 17th. In his own exhibit, which is listed and introduced as Defendant's/Petitioner's Exhibit B and B-1, it reads in part as follows: "He advised at approximately 7:30 A.M. this date" - It says "Interviewed on 3/18/77," that is the date, Your Honor, that the truck was discovered - "he went outside his residence," and it goes on down and says that he observed or he noticed a man leaving the pickup truck, enter a car, which was parked on the other side of the produce building, stated this occured between 8:00 and 8:30 A.M. and was positive on the time.

Counsel says and infers that Agent Robison of the FBI either was having delusions, or perhaps perjuried himself. Your Honor, the way I recall the evidence, the photographic evidence, there was water drip marks outlining parts of that truck. I submit it might take a little bit of logic to assume if you park your car and it rains where the car is parked, unless somebody washed it away, there would be drippings and the

outline as opposed to if you had parked your car there sometime after the rain.

I resent the comment by Counsel that Agent Robison lied and I resent more the false representations to this Court. There is nothing inconsistent. As a matter of fact, in the exhibit again, the old gentleman says he remembered the rain the night before he observed the incident. The testimony today -- That has been checked out, was checked out. It does not relate to our case here.

Finally, Your Honor, it is important to note that Oklahoma has spoken in reference to the Agurs case, and the Agurs case sets out, it is your duty as the trial Judge that if you remain convinced of the Defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable, it should be denied.

Oklahoma follows the Agurs case, which was decided, by the way, in June, 1976; Warner Houston Irvin, Sr. v. State of Oklahoma, August 29, 1980, less than a year ago, 617 P.2nd 588, adhering to the rule of Agurs. Other jurisdictions are: Commonwealth v. Ziegler, decided January, 1980 at 399 N.E.2nd 47, out of the State of Massachusetts; Rodriguez v. State, out of the State of Texas, decided April 16, 1980, cited at 597 S.W.2nd 917, which reaffirms the rule; the State of Idaho in State v. Horn, 610 P.2nd 551. I would state to Your Honor there is a South

Carolina case of State v. Newton; in Utah, Utah v. Gerald. They all follow the Agurs language insofar as the Court considering the context of the entire record, and I ask the Court to indulge me a question of the Court.

Has Your Honor, since the time of being placed on notice of filing of the application for relief under post-conviction appeal on alleged exculpatory material, had an occasion to reread the transcript of the testimony and reacquaint yourself with the totality of the record involving the trial of Larry Leon Chaney in the kidnapping/death of Kendall Inez Ashmore?

THE COURT: Yes, I have, Counsel, in detail.

MR. FALLIS: All right. I would submit and quite frankly say that the Court obviously is well aware and is able to follow the rule of Agurs. Based on that, coupled with the evidence, I submit there has been no reasonable doubt raised. Quite frankly, based on the totality of the record, there is no doubt as to the guilt of Larry Chaney.

MR. SMALLWOOD: I would like to respond first to the attack on me. If I made misstatements regarding the exhibits, they'll certainly speak for themselves. As far as Exhibits B and B-1, that contains the testimony of Agent Robison. B indicates that Mr. Hamilton stated the truck had just driven up at 7:30 A.M. on Friday morning. I can assume the FBI agent had this information in his possession, and yet he stated, based

on his observation it had been there since Thursday. That is not contradictory. I was not aware I said anything other than that.

Regarding the statement of Poppy Weaver that Mr. Fallis by innuendo has indicated that I have committed perjury insofar as offering exhibits to you, she indicated in D-1, in a portion of the exhibit, she is certain of the date and time. She was certain of the time because of the fire trucks. She is certain, in this report, as to who she saw, and the firemen ran their records at the Jenks Fire Department and substantiated that she was accurate in the certainty she had.

If her statements are different now, there again we're not here to determine that the human memory fails with the passage of time. We're here to determine if exculpatory evidence was denied me four years ago. I have not intentionally misrepresented anything to this Court, and I do resent the implication I have.

I think the evidence is sufficient to remand this case for a new trial, and/or to modify the punishment in this case, and I ask the Court to do that.

THE COURT: For purposes of the record, I have gone over the entire transcript of the trial. Of course, I've heard the evidence presented here today. I've read very closely all the pertinent points of law that Counsel has raised. I'm going to deny the application for post-conviction relief at this time.

I'll state into the record that I remain firmly convinced, even after hearing all of this evidence here today, that the Defendant in this case was properly convicted by evidence beyond a reasonable doubt. There is no question in my mind at this time, or has there been at any time since the jury brought in the verdict in the trial of this case, that the Defendant was properly convicted.

I sat through the entire trial, naturally, but not only that, over the last few days I've read the transcript again, and as you can see this is a very voluminous transcript, and it has taken me quite a bit of time to do so. I felt it was necessary because of the issues raised in post-conviction relief.

Again, I would like to state, after reviewing all of this, I think this is one of the strongest cases that I've ever seen as a trial judge as far as evidence against the Defendant is concerned. It goes almost beyond any reasonable doubt. It goes beyond any doubt, especially when you consider the case and the totality of the facts during the time of trial, when you consider the fact that the note left in Mr. Chaney's residence, the telephone calls that came out of his trailer, the fact that his palm print was left on the telephone in south Tulsa, that were his prints and were traced to that phone, and, further, the fact that Mr. Chaney did not testify at the trial, all these facts, all these factors, are to be considered by me in this hearing at this time. If I felt otherwise, I would

certainly rule accordingly.

Also, I would like to refer to Agurs v. United States and point out what Counsel for the State did not point out, and it's cited on page 2400. This case should be cited 427 US 108, Agurs v. United States. It states, "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." They go on further and say the constitution certainly does not demand that much.

So based upon the totality of the facts, the case that was tried, the evidence that was presented today, the fact that I am still firmly convinced that this Defendant committed this crime, based upon the evidence and everything that was presented at the trial, plus any and all evidence here today, I'm going to, again, as I stated, deny the application for post-conviction relief.

MR. SMALLWOOD: For purposes of the record, if I could clarify, it became clear that evidence was suppressed by the State of Oklahoma. I think everything indicated that. The question of whether it was material and exculpatory, am I to take, for purposes of the record, Your Honor, that you are finding as a matter of fact, the evidence that was suppressed, that it was not material, that it wasn't exculpatory, that it was not one or the other?

THE COURT: There was nothing material or exculpatory that I can find, based upon the totality of the facts in this case, and the testimony that Mr. Fallis gave.

MR. SMALLWOOD: But there was evidence suppressed.

MR. FALLIS: We take issue with that. There was no suppression of evidence, and presupposes exculpatory --

MR. SMALLWOOD: I'll withdraw that.

THE COURT: I think I have completed my remarks, and my remarks will speak for themselves.

MR. SMALLWOOD: If the Court please, I have to appeal this matter. I think it would be very easy if I ask you to clarify that a little bit.

THE COURT: I think I have, Counsel. I have stated it as clearly as I possibly can.

MR. SMALLWOOD: Is it my understanding that the evidence that was in the possession of the District Attorney and not given to me --

THE COURT: The record will speak for itself. We will recess at this time.

** ** **

COURT REPORTER'S CERTIFICATE

STATE OF OKLAHOMA,)
) ss.
COUNTY OF TULSA,)

I, Virginia A. Boone, Official Court Reporter for the Disctrict Court of Tulsa County, State of Oklahoma, do hereby certify the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma on May 1, 1981.

I further certify I am not related to nor counsel for any of the parties.

Affix my hand and seal on this 29th day of June, 1981.

Virginia A. Boone

Virginia A. Boone, CSR-RPR-CP

JUDGE'S CERTIFICATE

STATE OF OKLAHOMA,)
) ss.
COUNTY OF TULSA,)

I, Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, do hereby certify the foregoing transcript in the aforementioned cause was presented to me, and I now sign the same as true and correct, and request that it be attested and filed by the Court Clerk.

Witness my hand this 1st day of July, 1981.

JUDGE OF THE DISTRICT COURT

ATTEST:

Court Clerk.

Copy

RECEIVED
JUL 30 1981
ATTORNEY GENERAL
of Oklahoma

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

PC-81-345

LARRY LEON CHANEY,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

CRF-77-756

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 30 1981
Ross N. Lillard, Jr.
CLERK

Transcript of the proceedings had in the above-entitled cause on July 8, 1981 before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma.

APPEARANCES:

ALLEN M. SMALLWOOD, ESQUIRE,
Counsel for Petitioner.

JERRY E. TRUSTER, ESQUIRE,
Chief Prosecutor, District Attorney's office,
Counsel for Respondent.

DISTRICT COURT
FILED
JUL 29 1981
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

REPORTED BY:

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

** ** ** **

TULSA COUNTY
OFFICIAL TRANSCRIPT

APPENDIX "B"

PROCEEDINGS

THE COURT: This is case number CRP-77-756, Larry Leon Chaney versus the State of Oklahoma. This hearing is brought by application filed on behalf of the petitioner to reopen the post-conviction relief for further evidence.

After I received this application I contacted both the petitioner and respondent attorneys and advised them that the hearing would be set this morning on this application, and we briefly discussed it off the record, but I feel it should be put on the record at this time.

First of all, do you want to go ahead as the petitioner's attorney and state your grounds?

MR. SMALLWOOD: I do, Your Honor. Thank you.

It's my recollection, Judge, the hearing on my initial application for post-conviction relief was held on Friday, May 1, 1981. At that time, and the case made speaks for itself, I had received evidence, which had been attached to my application, marked as exhibits A through D-1 indicating that the State had in their possession prior to the preliminary hearing in this case, which was sometime in March of 1977, statements of witnesses indicating that, in my opinion, the defendant in this case, Larry Leon Chaney, was in no way associated with or guilty of either of the crimes of which he was charged, or at the very least such testimony or evidence would be mitigation as to punishment even if he were convicted of first degree murder.

Immediately prior to the hearing — I did not know the names of the witnesses. They had been blocked out, and I did not know the name of the FBI agent that had taken the statements. Those names were also blocked out.

Immediately prior to the hearing I found out the names of the witnesses who had made the statements. I contacted some of them and spoke with them. At the time of the hearing I had not learned the names of the FBI agents. I did learn from conversation with Mr. Fallis and certain witnesses that as of May or April, 1981, they were not saying the statements contained in the written transmission, or the Exhibits attached to my application were not accurate statements of what they had made to the FBI agents in March, 1977.

Mr. Fallis made that assertion both in answer to my questions and in his argument to the Court. I cannot deny that was the case because I had talked to the witnesses, and they were in fact now claiming that those written statements were not accurate.

Approximately, one to two weeks after the hearing occurred Mr. Fallis gave me the names of two FBI agents responsible for taking statements as shown in Exhibits A through D-1. One of the agents, Tom McLain, an agent here in Tulsa, I contacted him. My telephone call jogged his memory.

He indicated that he had taken the statement of Poppy Weaver, Exhibits C and C-1, he acknowledged that. In my

conversation with him I told him Poppy Weaver was now saying what was in the written report was not what she told him. Agent McLain indicated emphatically, although he could not vouch for the truthfulness of the oral statements given to him by any of the witnesses, he was absolutely and certainly positive that the written reduction of the oral statements made to him by Poppy Weaver was a true and accurate transmission of what had been said to him.

I feel since I did not have that information from Agent McLain at the time of the hearing, and under the new rules of evidence, I have a right to impeach my own witness. Had I had this evidence, I would have put Agent McLain on to bolster or substantiate the written statements of those witnesses, and that the statements made to Agent McLain were true and accurate.

I'm asking the Court now to allow me to reopen the post-conviction relief for the sole purpose to subpoena Agent McLain to make the statement in person to Your Honor in order to bolster and substantiate the fact the information contained in those statements were accurate. Nobody can vouch for the truthfulness, but it was an accurate reduction of the statements made to Agent McLain, and it is certainly exculpatory.

Therefore, it would obligate the Court to grant the petitioner a new trial or modify the sentence.

MR. TRUSTER: Just a brief response. My first observation, I was not present during the lengthy post-conviction

relief held in your Court as cited by Counsel. I have not been a party to this particular lawsuit at any stage either as an advocate or in any position during the hearing or trial, or in any other capacity until today.

However, it would be my observation that apparently from what Counsel has said, the person, Poppy Weaver would have been available to testify at the former hearing. If I'm in error, I apologize. If I'm not, I would make a further comment - that would be, of course, the best evidence of what Counsel has stated, and what Counsel has stated to reopen the post-conviction relief. He could have called Poppy Weaver at that time. If in fact that testimony had been given that might have disposed of the entire matter.

Nothing Counsel has said has given rise or any indication to me sitting here of any exculpation that would be any part of our file. The Court has made rulings that there was nothing exculpatory withheld from Counsel at the trial on an earlier occasion. We ask you to deny the application to reopen at this time, and say that nothing Tom McLain would say, if Counsel's representations are accurate, that would in any way change the former findings by this Court. There is nothing exculpatory the defense has been denied.

For those reasons and for the additional more important one, quite frankly, that is the very purpose of post-conviction relief. It is best summarized in the Law Review article by

Professor Lerbance from Oklahoma City University, who has credentials fairly impressive, cited at Volume 3, a law journal of the Oklahoma City University School of Law, February, 1976. In that article he expresses the view that there are several situations that have now been combined, and relief has been given by virtue of the passage of the post-conviction relief act, and the principal reason for the importance of that is to let a court of law have a single hearing and just indicate once and for all those matters alleged to have been error, constitutional and otherwise. That purpose would be defeated by Counsel's application to reopen a hearing that has been held by Your Honor and concluded with findings of fact and conclusions of law.

Additionally, I would only say, if the Court takes the position to reopen the hearing, what would become of a situation that was thought of by this act? It would in fact result in an unending number of applications upon applications for piecemeal relitigation of post-conviction procedure.

For all those reasons I ask the Court to deny the application to reopen the post-conviction relief.

THE COURT: I'll deny the application of defense counsel -- counsel for petitioner at this time.

MR. SMALLWOOD: If I could briefly respond, Your Honor.

THE COURT: Very well.

MR. SMALLWOOD: It would not be unending as long as the evidence you are alleging to have discovered was not available

at the trial, or for the post-conviction relief. The evidence of Tom McLain was not available.

Number 2, I have yet to receive a written finding of facts. I have to attach that to my petition in error. I have yet to receive written conclusions of law. I ask Your Honor to direct the District Attorney to provide me with written findings of fact and conclusions of law to accurately reflect --

THE COURT: I don't think that is necessary since everything was reported.

MR. SMALLWOOD: It is in the statutes. It must be attached to the petition in error.

THE COURT: Show me the statute.

MR. SMALLWOOD: Title 22, and I quote, "if application cannot be disposed of on pleadings and record, or there exists material issue of fact, trial court must conduct evidentiary hearing, and make specific findings of fact stating expressly its conclusions of law relating to each issue presented."

THE COURT: Which section?

MR. SMALLWOOD: 1084. The rules of the Court of Criminal appeals is that written findings of fact and conclusions of law must be attached to the petition in error.

MR. TRUSTER: If the Court please, there is nothing in 1084 that says the Court is obligated to reduce the oral findings of fact and conclusions of law into writing. There is nothing in 1084 that says that.

I think the Court's observation earlier is correct, that is why you have a Court Reporter and that is why a transcript is prepared. Counsel stated before this hearing he had ordered the same, and is going to attach it to the appeal record. I think for all those reasons the matter is clear.

THE COURT: I do recall stating my decision in the record. Did I not, Counsel?

MR. SMALLWOOD: You just denied it, Judge.

I would call Your Honor's attention to the rules of criminal appeals regarding appeals of this nature, post-conviction relief appeals to the Court of Criminal Appeals. I need to attach the findings of fact and conclusions of law to my petition in error, and it so states that in the rules.

THE COURT: Do you have anything else to offer?

MR. SMALLWOOD: I would state I have had conversation with Agent McLain, and he is available pursuant to subpoena power to testify. Putting his testimony in the record would cause no harm or delay to the State or Your Honor.

THE COURT: I will deny the application and will allow an exception.

(The proceedings were concluded at this time.)

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

I, Virginia A. Boone, a Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct transcription of the proceedings had on July 8, 1981 before the Honorable Jay D. DAlton, Judge of the District Court in and for Tulsa County, State of Oklahoma.

I further certify I am not related to nor counsel for any of the parties.

Affix my hand and seal this 24th day of July, 1981.

Virginia A. Boone

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

** ** ** **

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

I, Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, hereby certify that the foregoing was presented to me in the aforementioned matter, and I now sign the same as true and correct, and request that it be attested and filed by the Court Clerk.

Witness my hand this 28th day of July, 1981 at Tulsa County, State of Oklahoma.

JUDGE OF THE DISTRICT COURT

ATTEST:

Court Clerk